

# OFFICE OF THE ATTORNEY GENERAL



95-00033

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November 28, 1994

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Honorable William C. Young  
Executive Director  
Board of Pardons and Paroles  
Gordon Persons Building  
50 North Ripley Street  
Montgomery, AL 36130-2405

DNA - Forensic Sciences -  
Pardons and Paroles - Crimes  
and Offenses - Courts

Act No. 94-804 requires equal DNA testing of all persons convicted of a felony offense both before and after the effective date of the Act so long as those persons remain under the jurisdiction of the Alabama Board of Pardons and Paroles. The Board should suspend actions on pardons pending promulgation of emergency rules and regulations under the Administrative Procedure Act regarding DNA testing and the notification by the Department of Forensic Sciences of the completion of the required blood test of the subject candidate for pardon.

Dear Mr Young:

This opinion is issued in response to your request for an opinion from the Attorney General in your letter of

August 12, 1994, in which you stated that the Alabama Board of Pardons and Paroles desires to know the legal impact of Act No. 94-804 (DNA Act) upon the operation of that agency, and the actions the Board must take to comply with provisions of this Act. You posed the following three questions.

#### QUESTIONS

1. What offenses require DNA testing prior to the granting of a pardon or parole?
2. What are the differences in offenses committed prior to and subsequent to the effective date of the Act as it pertains to action by the Alabama Board of Pardons and Paroles?
3. Must the Alabama Board of Pardons and Paroles suspend action on pardons pending promulgation of rules and regulations by the Director of the Department of Forensic Sciences?

#### FACTS, LAW AND ANALYSIS

Act No. 94-804 of the 1994 First Special Session of the Alabama Legislature authorizes the Director of the Department of Forensic Sciences to establish DNA database systems based on genetic markers. It authorizes collection, testing and storing of certain DNA samples.

The Act authorizes the creation, maintenance, and exchange of DNA records and provides for the analysis, typing, and recording of genetic markers as the same may pertain to the identification or exclusion of criminal suspects. In this regard, it authorizes DNA testing and requires the inclusion of DNA records of persons convicted of felony offenses and particularly any offenses involving danger to the person found in Chapter 6, Title 13A, Code of Alabama 1975. It also authorizes the Director of the Department of Forensic Sciences to promulgate rules and regulations regarding procedures for collection and submission of DNA samples.

Act No. 94-804 is applicable to two general categories of persons insofar as DNA testing of convicted felons is concerned.

DNA testing is required for the category of persons convicted after the effective date of Act No. 94-804 for a felony offense in that part of Section 5 of the Act beginning at page 8, line 16 and inclusive of subsections 5(a), (c), (d), and (e) as follows:

"The DNA database shall contain DNA records which the Director shall deem necessary for the implementation of this act, and also shall contain DNA records of:

"(a) Persons convicted after the effective date of this act for a felony offense. . . .

"(c) Persons convicted after the effective date of this act of any offense contained in Chapter 6, Title 13A, Code of Alabama 1975, or as the same is hereafter amended.

"(d) Persons convicted after the effective date of this act of any attempt, solicitation, or conspiracy to commit any offense contained in Chapter 6, Title 13A, Code of Alabama 1975, or as the same may be hereafter amended.

"(e) Persons convicted or sentenced after the effective date of this act for any of the offenses enumerated above and serving a sentence of probation, suspended sentence, or other sentence or judgment not requiring immediate incarceration."

The other general category to which Act No. 94-804 is applicable for DNA testing is those persons who had already

been convicted of a felony<sup>1</sup> and were under the jurisdiction of state or county correctional facilities, criminal justice system entities including courts regarding those convicted felons under suspended sentences,<sup>2</sup> and court-ordered probation under court supervision,<sup>2</sup> as well as persons under the jurisdiction of the Alabama Board of Pardons and Paroles<sup>3</sup> as of (prior to and upon) the effective date of the Act, pursuant to that part of the Act pertaining to subsection 5(b) beginning at page 8, lines 16 through 18 and 21 through 24, as well as Section 6, beginning at page 9, line 10 of the Act, as follows:

"Section 5. . . The DNA database shall contain DNA records which the Director shall deem necessary for the implementation of this act, and also shall contain DNA records of: . . .

"(b) Persons confined as of the effective date of this act under a sentence of imprisonment or involuntary incarceration or confinement in a prison, jail, or other incarceration facility as a result of any felony conviction."

"Section 6. (a) All persons convicted of a criminal offense as set out in Section 5 of this act shall, when requested by the Director submit to the taking of a DNA sample or samples as may be specified by the Director, provided, however, the Director shall promulgate such rules and regulations as may be

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<sup>1</sup>Civil Disabilities of Convicted Felons-A State by State Survey, October 1992, Prepared by Office of the Pardon Attorney, U.S. Department of Justice.

<sup>2</sup>§ 15-22-36, Code of Alabama 1975.

<sup>3</sup>Amendment No. 38, Alabama Constitution of 1901.

necessary for the purposes of ensuring that DNA samples are collected in a medically approved manner.

"(b) As of the effective date of this act all persons serving any sentence of probation for any of the offenses set out in Section 5 of this act shall, when requested by the Director, submit to the taking of a DNA sample or samples as specified by the Director. Upon the refusal of any such person to so submit the sentencing court shall order such submission as a mandatory condition of probation.

"(c) As of the effective date of this act all persons convicted of any of the offenses set out in Section 5 of this act shall be ordered to submit to the taking of a DNA sample or samples as specified by the Director as a mandatory condition of any term of probation or suspended sentence which may be imposed by the sentencing court.

"(d) As of the effective date of this act, all persons convicted for any offense set out in Section 5 of this act and under any sentence of confinement to any incarceration facility, shall, when requested by the Director, submit to the taking of a DNA sample or samples as specified by the Director. Upon the refusal of any such person to so submit, the custodian of the incarceration facility shall require such submission as a mandatory condition of any temporary, partial or limited release, including, but not limited to, work release, furlough, or other incentive release.

"(e) As of the effective date of this act, all persons convicted of any of the offenses set out in Section 5 of this act, shall be ordered by the

sentencing court to submit to the taking of a DNA sample or samples as may be specified by the Director as part of the sentence to be imposed.

"(f) As of the effective date of this act, all persons convicted for any offense set out in Section 5 of this act who may be eligible for consideration by the Alabama Board of Pardons and Paroles for either a pardon or parole shall be ordered by the Alabama Board of Pardons and Paroles to submit to the taking of a DNA sample or samples as may be specified by the Director, as a mandatory condition of the pardon or parole."

#### CONCLUSIONS

Under Act No. 94-804 of the 1994 First Special Session of the Alabama Legislature, DNA testing of all persons convicted of a felony offense is required prior to their pardon or parole. DNA testing of persons convicted of felony offenses before the effective date and after the effective date of Act No. 94-804 is equally required so long as those persons remain under the jurisdiction of the Alabama Board of Pardons and Paroles. However, the Alabama Board of Pardons and Paroles should suspend actions on pardons pending the promulgation of emergency rules and regulations<sup>4</sup> by the Department of Forensic Sciences regarding DNA testing under the Alabama Administrative Procedure Act together with the institution of a system of notification by the Department of Forensic Sciences to the Board of Pardons and Paroles of testing compliance by the subject candidate for a pardon.

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<sup>4</sup> §§ 41-22-5(b), 41-22-6, Code of Alabama 1975.

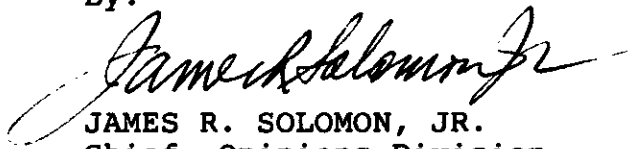
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I hope this sufficiently answers your questions. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS  
Attorney General

By:



JAMES R. SOLOMON, JR.  
Chief, Opinions Division

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